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Issue Date: 12 April 2007

CASE NO. 2005-LHC-01378

OWCP NO. 15-42870

In the Matter of:

D.B.,
Claimant,

vs.

DEPARTMENT OF THE ARMY/NAF,
Employer,

and

ARMY CENTRAL INSURANCE FUND/
BROADSPIRE CLAIMS SERVICE.
Carrier/Claims Administrator.

Appearances:

Jay Lawrence Friedheim, Esq.
For Claimant

Cynthia Gutierrez, Esq.
For Employer/Carrier

BEFORE: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves claims arising under the Longshore and Harbor Workers' Compensation Act as amended ("the Act"), 33 U.S.C. § 901 *et seq.*

A formal hearing was held in Honolulu, Hawaii on February 27 and March 1, 2006, at which both parties were represented by counsel and the following exhibits were admitted into

evidence: Administrative Law Judge's exhibits ("ALJX") 1-2;[1] Claimant's exhibits ("CX") 1-32; and Employer's exhibits ("RX") 1-26.[2] Transcript ("TR") at 10-12, 213-14, 247, 261, 284.

On May 1, 2006 Claimant filed his post-trial brief, which was admitted as ALJX 3. On May 16, 2006, Employer filed its post-trial brief, which was admitted as ALJX 4.

On June 2, 2006, Employer submitted a copy of Claimant's functional capacity evaluation ("FCE"), which was admitted as RX 27. On July 21, 2006, Employer filed a supplemental report from Dr. Paul Smith, which was admitted as RX 28. On September 29, 2006, Employer filed a supplemental report from Dr. Neil Katz, which was admitted as RX 29.

On October 11, 2006, Employer filed its supplemental post-trial brief, which was admitted as ALJX 5. On October 12, 2006, Claimant filed his supplemental post-trial brief, which was admitted as ALJX 6.

On October 25, 2006, I held a telephone conference with the parties to discuss the possibilities for settlement. After the conference, the decision and order was held in abeyance while the parties continued to negotiate. On January 16, 2007, Employer's counsel submitted a letter stating that Employer no longer wishes to pursue settlement and requests the court to proceed with the decision and order. On February 2, 2007, Claimant's counsel reopened settlement negotiations, and the decision and order was once again held in abeyance. On February 26, 2007, Employer's counsel submitted a final letter stating that Employer no longer wishes to pursue settlement and requests the court to proceed with the decision and order.

On March 21, 2007, at the request of this office, Claimant filed a copy of Dr. Smith's March 1, 2006 deposition, which is admitted as CX 33, thereby closing the record in this case.

Stipulations:

At the hearing, the parties agreed to the following stipulations:

1. The place of injury was Schofield Barracks in Hawaii.
2. The injury occurred on July 6, 1998.
3. Claimant was aware that the disability was work-related on July 6, 1998.
4. Employer had notice of the injury on July 6, 1998.
5. Disability commenced on July 7, 1998.
6. The claim is for compensation, medical benefits, and attorney fees and costs.
7. The claim was timely noticed and timely filed.
8. The Longshore Act applies to this claim.
9. At the time of the injury, an employer-employee relationship existed between Claimant and Employer.
10. Claimant has suffered an injury to his back.

[1] Claimant's Pretrial Statement, which was filed on February 14, 2006, is ALJX-1, and Employer's Pretrial Statement, which was filed on February 10, 2006, is ALJX-2.

[2] Where available, all citations are to the cumulative, Bates-stamped page numbers.

11. This is an unscheduled injury.
12. The injury arose out of and in the course of Claimant's employment.
13. Claimant reached maximum medical improvement on October 31, 2000.[3]
14. Employer/Carrier is currently providing compensation and medical benefits.
15. There are no outstanding medical bills at present.
16. Claimant is not currently working. Claimant contends he can do no work, while Employer contends he can do alternative work.
17. Employer has paid Claimant compensation at the rate of $306.07 per week for the following periods: temporary total disability from July 6, 1998 through July 7, 1998; one day on July 16, 1998; from July 27, 1998 through July 29, 1998; from July 31 1998 through August 4, 1998; and from September 30, 1998 through October 30, 2000; and permanent total disability from October 31, 2000 through March 21, 2004. Employer has paid Claimant permanent partial disability from March 22, 2004 through the present and continuing at the rate of $92.72 per week.[4]
18. Claimant's AWW is $459.08.[5]

TR at 5-10. I accept all of these stipulations as they are supported by substantial evidence in the record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.,*16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 (1985).

Issues in Dispute:

1. Extent of Claimant's permanent disability;

2. Employer's entitlement to credits for overpayment of compensation.

TR at 9-10.

SUMMARY OF DECISION

I find that Claimant is unable to return to his usual employment. I find that Employer has demonstrated the availability of suitable alternative employment, such that Claimant's retained

[3] I note that Claimant's treating physician, Dr. Smith, opined on March 29, 1999 that Claimant had reached MMI. RX 2 at 11; RX 25 at 466; CX 33 at 18-20. Despite this, the parties' stipulation is supported by the opinion of Dr. Kenneth Kaan, an orthopedic surgeon who evaluated Claimant on behalf of Employer, that Claimant had reached maximum medical improvement on October 31, 2000. RX 5 at 45; CX 12 at 88.

[4] *See* CX 29 at 301-02.

[5] The parties each stated in their pretrial statements that Claimant's average weekly wage ("AWW") was $459.08. ALJX 1; ALJX 2. On the first day of the hearing, however, Claimant contended that his AWW was $479.60. Tr at 8. On the second day of the hearing, Employer provided payroll records confirming Claimant's AWW of $459.08, and Claimant was given two weeks to search his own records for evidence of a higher AWW. Tr at 281-83. At the end of the hearing, Claimant stipulated to an AWW of $459.08. Tr at 286. Then, on March 9, 2006, Claimant's counsel submitted a letter, which was admitted as ALJX 7, stating, "Pursuant to the instructions by the Court, my client, [Claimant] has checked through his records however, we have not been able to find any evidence to prove he was getting the higher rate of pay of $11.99 at the time of his work accident." Thus, the parties agree that Claimant's AWW is $459.08.

earning capacity was $237.72 as of November 3, 2003. Claimant has failed to demonstrate that he conducted a diligent search for employment. Consequently, Employer is liable for permanent partial disability compensation at the rate of $147.57 from November 3, 2003 through the present and continuing. Employer continues to be liable for Claimant's medical care for his work-related back condition.

FINDINGS OF FACT

General Background

Claimant was born on June 16, 1955, and was 50 years old at the time of the hearing. Tr at 21. He graduated from high school in Fort Lauderdale, Florida. Tr at 21. From before the time of injury through the present, Claimant has resided in Wahiawa, Hawaii. CX 2 at 13.

Claimant was in the U.S. Army as a helicopter repairman from November 1974 until he was honorably discharged in October 1980 with aortic stenosis, a heart condition. Tr at 21-22; CX 2 at 13; RX 8 at 134; RX 8 at 191. Claimant receives VA disability benefits in the amount of $85.00 per month based on a ten percent disability rating. CX 2 at 14; RX 8 at 135; RX 8 at 192.

He worked in various jobs over the years, including Sears carpet cleaning from about 1980 to 1982, car and motorcycle sales from about 1983 to 1988, tire and spot mechanic for Bob's Tractor Service from about 1990 to 1992, self employment through a towing and used parts business, and cashier and night janitor for Texaco from September 1992 to 1993. Tr at 22-24; CX 2 at 15; RX 8 at 136.

In or around September 1993, Claimant started working for Employer as a motor vehicle operator, or tow truck driver. Tr at 25-26; CX 2 at 13; CX 3 at 18; CX 4; RX 8 at 134. Claimant suffered the instant back injury while operating a tow truck at work on July 6, 1998. Tr at 30; CX 1; RX 8 at 143-44.

After partially recovering from his July 6, 1998 work injury, Claimant returned to work for about two months, working as a cashier at Employer's salvage yard and craft shop. Tr at 32, 63; RX 7 at 73. Dr. Smith had released him to do modified work, or limited duty with restrictions. Tr at 62. Claimant testified that he was "able to do it only if I was able to get up and move around…. Sitting for a long period of time agitated the back, lower back, which in turn radiated down to the left side of my leg." Tr at 64. He testified that he was able to sit and stand at will, but that "the boss sent me home as well because he said he was tired of seeing me suffer." Tr at 64. He still had to miss work occasionally due to pain from his injury and physical therapy appointments during work hours. Tr at 32, 63.

On or around September 30, 1998, Claimant's employment was terminated due to a reduction in force. Tr at 33; RX 8 at 147-159. Claimant attempted to find another light duty position with Employer, but was unable to find one. He wanted to keep working within the federal government system, because he would keep his seniority, benefits, and yearly raises, and his years of work would be added together with his prior military service for retirement purposes.

Tr at 28-29, 35. Claimant later sought to return to work for Employer and asked about light duty jobs, "But they didn't have anything that would accommodate me at the time." Tr at 52.

Claimant testified that he cares of his 12-year-old son, who has special needs, and that his mother-in-law, who is being treated for cancer, and his brother-in-law live with his family. Tr at 77-78. Claimant testified that he participates in some sports with his son. Tr at 78-79.

OWCP Vocational Rehabilitation

Claimant participated in a vocational rehabilitation program through OWCP from April 1999 through April 2002. Tr at 35, 99; CX 21; RX 9. However, Claimant's OWCP vocational rehabilitation was interrupted from September 30, 1999 through May 2001 due primarily to complications from his cardiac condition, including a heart attack on July 26, 2001. Tr at 99-10; RX 9 at 234, 254, 259, 264, 276, 281, 287, 297.

As part of his OWCP vocational rehabilitation, Claimant underwent vocational testing on April 30, 1999. CX 21 at 142; RX 9 at 311. Ms. Havre noted, "The highest training modality that was considered to be feasible is a certificate of completion program at a community college or trade school. Strongest aptitudes were clerical perception and form perception. Weakest were general learning ability and verbal aptitude. Positions that were suggested for further exploration by the evaluator includes the following: production superintendent, office machine repairer, shipping and receiving clerk, route salesperson, and clerk." CX 21 at 143. *See* RX 9 at 312.

On June 13, 2001, Ms. Havre noted, "[Claimant] reported that the networking that he has initiated as a result of attending the recent Job Fair has identified the service writer within the automobile sales & service industry as a tentative job goal that he feels will complement his work experience. He further indicated that his access to this type of work would increase if he is able to develop basic computer skill sets as well." RX 9 at 261. As a result of Claimant's interest, Ms. Havre created a rehabilitation plan and conducted a labor market survey for Claimant to seek employment as a Service Writer and Collision Estimator. RX 9 at 223-27, 237-38, 243-52, 253-56, 259-63. Ms. Havre noted, "This type of work is considered viable not only from the standpoint of [Claimant's] work restrictions, but is also within his aptitudes & interest. Further, employment as a Service Writer has thus far been identified as being available in reasonable numbers both currently as well as in the future." RX 9 at 238.

Claimant was in "training status" from August through September 2001 and taking computer/typing classes in order to be competitive for service writer positions. Tr at 49; RX 9 at 220-22. Claimant took beginning-level typing and computer classes, including Typing I, Computer Basics I and II, and Beginning Internet for PC. Tr at 35-36; CX 20 at 131-37; RX 9 at 213-20, 232-33, 239. Claimant testified that, prior to taking these classes, he had not had experience with computers and "didn't even know how to turn it off and on." Tr at 49.

From October through December 2001, Ms. Havre worked with Claimant to identify and apply for service advisor, service writer, and collision estimator positions. CX 21 at 147-50, 152-53, 155, 158-59; RX 9 at 198, 205-11.

Beginning in November 2001, Ms. Havre noted that the September 11th tragedy was making the labor market slower and more competitive, and that Claimant's vocational rehabilitation was less likely to be successful. RX 9 at 199, 202; CX 21 at 156. Consequently, Claimant's formal vocational rehabilitation ended in early January 2002, and his file was closed on April 8, 2002 because he was unable to obtain employment due to the impact of the September 11th tragedy on the labor market. CX 21 at 160-61; RX 9 at 196-97.

Sam's Club

Claimant worked at the tire and auto center at Sam's Club for two to three months beginning on April 19, 2003. Tr at 47-48, 53-54, 64. RX 23 at 411-12, 416-23. He earned approximately $2,000 during this time. CX 1 at 11; RX 14 at 325.

Claimant was first assigned to changing tires, which involved lifting and carrying tires, including truck tires weighing at least 25 pounds. Tr at 64-65, 68. Claimant testified that he had pain in his back while working and in the evenings after work. Tr at 68. When asked whether changing tires was difficult because of his cardiac condition or his back problems, Claimant answered, "The job was difficult because of my age. I wasn't able to keep up with the young boys." Tr at 69. Claimant worked changing tires only for a short period, because it was difficult for him and his co-workers called him "grandpa" because he worked very slowly. Tr at 48-48, 67-68. Consequently, the supervisor moved Claimant from the shop area up to the front end of the store, where he was the first person to greet customers and speak to them about their orders. Tr at 47-48, 68. Claimant was assigned to the front end work "because they saw that my skills were better for greeting and handling it that way" and "because they said I was a people-type person." Tr at 47-48, 68. However, Claimant testified that the "front end" work was also difficult because he was on his feet, standing on a rubber mat all day. Tr at 69. He was not able to do the job because he was required to stand for the entire shift. Tr at 48. Claimant testified that "It was very uncomfortable at night for me when I would get off of work." Tr at 48.

Claimant voluntarily stopped working at Sam's Club. Tr at 70. Claimant has not worked since Sam's Club. Tr at 77. Claimant agreed that he could have continued, or could now take and perform, the job of front end cashier if he were allowed to sit and stand at will. Tr at 69-70.

Dr. Katz testified that the job that Claimant performed at Sam's Club was beyond his restrictions "[i]f he was doing anything with tires, other than looking at them…" Tr at 266. Ms. Meyers also testified that she did believe Claimant was capable of performing the job at Sam's Club. Tr at 152.

Claimant's Physical Limitations

In addition to his work-related back injury, Claimant has a pre-existing heart condition (aortic stenosis) and other health problems, including obesity, diabetes, and sleep apnea, which have contributed to his overall condition and his physical limitations. Tr at 42, 46.

Between January 1999 and July 2001, Claimant was evaluated, for purposes of determining his fitness for vocational rehabilitation and his physical restrictions, by various physicians, including Dr. Donald Maruyama on January 26, 1999, RX 6 at 46, 53; CX 10 at 75-83; CX 16 at 120; Dr. Bernard Robinson on July 28, 1999, September 13, 1999, September 27, 1999, and May 9, 2001, RX 25 at 444, 476, 481; CX 16 at 123; CX 25 at 291-92; RX 9 at 272-74; RX 25 at 485-88; Dr. Laura Wong on August 8, 2000 and May 8, 2001, RX 9 at 275, 281, 286; CX 16 at 122; RX 9 at 275; and Dr. Kenneth Kaan on October 31, 2000, CX 12 at 88-89; RX 5 at 45. However, I give little weight to these physical restrictions because they were not given by Claimant's treating physician or Employer's medical expert in this case. In addition, most of these restrictions were given before Claimant reached maximum medical improvement and therefore, do not constitute permanent restrictions. Lastly, most of these restrictions were given only for the purpose of Claimant's short-term participation in vocational rehabilitation and not for indefinite, permanent employment.

On May 18, 1999 an FCE was conducted and showed Claimant was capable of light work. CX 33 at 20. The FCE concluded that Claimant "is able to work at the Light Physical Demand Level for an 8 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991." CX 15 at 117. The FCE showed that Claimant could do a 12" lift of 20 pounds occasionally, 10 pounds frequently, and 4 pounds constantly; a shoulder lift of 28 pounds occasionally, 20 pounds frequently, and 6 pounds constantly; an overhead lift of 15 pounds occasionally, 8 pounds frequently, and 3 pounds constantly; carrying weight of 25 pounds occasionally, 13 pounds frequently, and 5 pounds constantly; pushing and pulling weight of 100 pounds occasionally, 50 pounds frequently, and 20 pounds constantly. CX 15 at 118. The FCE also showed that Claimant could do frequent sitting, frequent standing, frequent walking, frequent reaching, occasional climbing, and no bending, squatting, kneeling, or crawling. CX 15 at 118. Occasionally was defined as 1-33% of day or 1-32 reps per day, frequently was defined as 34-66 % of day or 33-20 reps per day, and constantly was defined as 67-100% of day or more than 200 reps per day. CX 15 at 118.

In his May 20, 1999 report, Dr. Smith outlined permanent restrictions for Claimant based on the results of the May 18, 1999 FCE. CX 33 at 20-21; CX 8 at 63; CX 17. Dr. Smith restricted Claimant to no lifting more than 25 pounds and only occasional lifting 11-25 pounds; no climbing, occasional bending, occasional squatting, occasional kneeling, frequent reaching above shoulders, and no restrictions on repetitive hand motions. CX 8 at 63; CX 17; RX 25 at 469. Occasional was defined as up to 1/3 workday and frequent was defined as 2/3 workday. CX 8 at 63; CX 17; RX 25 at 469. Dr. Smith testified that he believed Claimant could return to work as of June 2, 1999, as long as he stayed within these restrictions. CX 33 at 42.

On January 1, 2003, Dr. Neil Katz evaluated Claimant on behalf of Employer. RX 2. In his January 31, 2003 report, Dr. Katz noted, "the patient states that … he can only sit for about 10 minutes at a time." CX 13 at 93; RX 2 at 8. Dr. Katz recommended that Claimant "not be able to return to full duty based on his current complaints and past functional capacity evaluation reports. I would instead recommend that the patient be allowed to return to work at modified duty based on the most recent functional capacity evaluation." CX 13 at 104-05; RX 2 at 18.

On October 15, 2004, Dr. Smith issued the following work restrictions and limitations: 2 hours per shift of stooping, twisting, or bending; 2 hours per shift of squatting or kneeling; one half-hour at a time of sitting; one half-hour at a time of standing or walking; 2 hours per shift of work at or above shoulder level; infrequent stair climbing; no climbing ladders or scaffolding; pushing or pulling a maximum of 10 pounds for 6 hours per shift; lifting or carrying a maximum of 10 pounds for 6 hours per shift; repetitive lifting of a maximum of 10 pounds for 4 hours per shift. CX 16 at 126; CX 28 at 300; RX 1 at 1; RX 25 at 491. Dr. Smith testified that he believed as of his October 15, 2004 report, that these were permanent restrictions and that Claimant could return to work and perform the work if he stayed within the restrictions. CX 33 at 51-52. Dr. Smith clarified that the October 15, 2004 work restrictions pertained only to Claimant's lower back injury, and not his other medical conditions. CX 33 at 70.

Dr. Smith testified that as of June 3, 2005, he "had declared [Claimant] as being permanent[ly] restricted and being medically stable." CX 33 at 37. He testified that, although Claimant's lifting capability had increased from 10 to 25 pounds between October 15, 2004 and June 3, 2005, Claimant's lifting restrictions remained at 10 pounds. CX 33 at 54-58, 71-74.

On November 15, 2005, Dr. Katz reexamined Claimant at the request of Employer. CX 13 at 109; CX 27 at 294; RX 4 at 19. Dr. Katz noted, "He states that because he now knows his limitations, he is able to avoid episodes of the most intense back pain. He states that he is not able to stand on his feet for more than 30 minutes at a time without feeling pain in his lower back." CX 13 at 110; RX 4 at 30. Dr. Katz also noted, "Since there now appears to be muscle atrophy, not previously appreciated, the claimant's condition appears to have worsened since seen in 2003." CX 13 at 113; CX 27 at 298; RX 4 at 33.

Dr. Katz evaluated Claimant on February 21, 2006 at the request of Claimant's counsel, and noted, "Since he is remaining at low demand, he has remained asymptomatic. If he was to increase the demand, such as returning to full-time full-duty work at his previous job, he might reaggravate the condition and his symptoms would occur." CX 31 at 307; Tr at 250, 254.

Dr. Katz testified at the hearing on March 1, 2006 as an expert in orthopedic surgery. Tr at 220-21; RX 15 at 326. Dr. Katz practices in orthopedic surgery and sports medicine. TR at 220. He is board certified in orthopedic surgery. Tr at 262. He testified that occupational medicine is a peripheral part of his expertise. Tr at 262. Dr. Smith, Claimant's treating physician, testified as an expert at a March 1, 2006 deposition. CX 33 at 6-7. Dr. Smith is a physician specializing in occupational medicine. CX 33 at 5. He has a Master's degree in public health, and is board certified in occupational medicine. CX 33 at 6.

At the time of hearing on March 1, 2006, both Dr. Katz and Dr. Smith expressed concern that Claimant had become deconditioned from being out of work and inactive for a long period of time. Tr at 257; CX 33 at 37. They each expressed concern that Claimant would have to undergo reconditioning before returning to work, or at least certain types of work. Tr at 267; CX 33 at 72. Dr. Katz also admitted that he had been using the March 18, 1999 FCE as objective measure of Claimant's abilities because it was the only FCE they had. Tr at 257, 276. Dr. Katz testified that a new FCE would be "the best way to tell" what work Claimant is capable of performing and what his restrictions should be. Tr at 251, 260, 272, 276-77. Similarly, Dr.

Smith testified that Claimant's current work restrictions remain the same as they were on October 15, 2004. CX 33 at 61. However, Dr. Smith agreed that Claimant might actually be less able to return to work than when those restrictions were given because he is deconditioned. CX 33 at 71.

Because of his uncertainties about Claimant's physical capacity, Dr. Katz repeatedly emphasized in his hearing testimony that Claimant was capable of "trying" to work. Tr at 234, 236, 266-67. When asked whether Claimant would reaggravate his condition by returning to full duty work within his restrictions, Dr. Katz stated, "Well, that's the million dollar question, … but in my opinion, the only reason that Dr. Smith and I probably differ is I think he ought to be given the opportunity to try and see how he does. He wants to go back to work. I have no problem with him trying. The only way to find out if he's going to handle it is to let him try. My understanding of Dr. Smith's opinion is he doesn't want to give him that opportunity to try which is a perfectly acceptable opinion, and so he's restricting him even more than I am." Tr at 250-51. Dr. Katz conceded that his approval of jobs from the labor market surveys was speculative to allow Claimant to try them, rather than an outright commitment that Claimant could do those jobs. Tr at 259-60, 272. Dr. Katz testified that if Claimant tried some of the approved jobs, he might not be able to handle it or might experience "more pain, but it's not necessarily going to make the condition itself worse. It's just … he's going to suffer because of it. So that's why I have felt all along for him is that we could give him the opportunity to try, if he wants to. Whether or not he can handle it is – the proof's going to be in the pudding, you know. That's the only way to really tell." Tr at 259. Dr. Katz also agreed that "a lot of the approval" that he gave for Claimant to do jobs in the labor market surveys "is based upon his unbridled enthusiasm to try to go out and go back to work." Tr at 258.

Similarly, because of his concerns of about Claimant's deconditioned status, Dr. Smith opined that Claimant could "go back to gainful employment based on his work restrictions for his back problem specifically" but that his return to work is "also going to depend on his other medical problems, the status of those." CX 33 at 63; CX 33 at 70. Dr. Smith opined that Claimant could not perform the proposed jobs even if he had the ability to sit and stand as needed. CX 33 at 59-60. He explained that he considers more than just the objective physical requirements of a proposed position because "part of my job as an occupational medicine specialist is to try to match up…the man and the work that they do, taking into account risk factors that…may be represented by him returning to work or, in his particular case, I think he really had an intolerance in terms of sitting, and sometimes it's not very easy to reveal that in terms of documentation." CX 33 at 60-61. Dr. Smith explained further that, even if a job involved frequent sitting with the ability to sit and stand at will, "the reality is that given this long period of time, it's very difficult for a patient to return, and … I think there's been a significant amount of deconditioning that has taken place with him. So when I look at job descriptions for him, one of the things that I would really think would need to happen for him is some type of reconditioning." CX 33 at 69. Dr. Smith testified that being deconditioned reduces Claimant's likelihood of getting a job. CX 33 at 37-38.

Based on all of these uncertainties about the status of Claimant's condition and his physical restrictions, I recommended that the parties obtain a new FCE. Tr at 278.

Claimant underwent a five-hour FCE on May 19, 2006, and a report was issued on May 22, 2006. RX 27. The FCE showed that Claimant was capable of sedentary work for an 8-hour day. RX 27. Sedentary work is defined as seated work with lifting up to 10 pounds occasionally. RX 27. Occasional is defined as 3 to 33% of the day or 5 to 32 reps, and frequent is defined as 34 to 66 % of the day or 33 to 250 reps. RX 27. He has a power lift capability of 10 pounds occasionally and 15 pounds infrequently, and can do a two-hand carry of 10 pounds occasionally and 20 pounds infrequently. RX 27. The FCE also demonstrated that Claimant could do frequent bending, occasional squatting, frequent kneeling, occasional stair climbing, and occasional crawling. RX 27. He can also do frequent sitting, standing, walking, and reaching. RX 27. The narrative report noted, "[Claimant] reports that he …can drive or ride in a car for 0.5 hours before needing a rest." RX 27. The report also noted, "He reports pain in his low back for lengths of time greater than a half hour. No difficulty observed with sitting in chair and also with stand to sit and sit to stand/from chair with intake/history portion of test." RX 27.

On June 22, 2006, Dr. Smith issued a supplemental report based on the May 19, 2006 FCE. RX 28. Dr. Smith stated, "[Claimant] is capable of performing gainful employment commensurate with a sedentary physical demand level. I would recommend that potential employment opportunities be required to permit changes of position as tolerated. I would discourage pursuit of bank/financial related jobs due to lack of vocational interest and skill level. [Claimant's] aptitude, skills and enthusiasm involved the automotive area and remains his vocational area of choice." RX 28

On August 23, 2006, Dr. Katz issued a supplemental report based on the FCE. RX 29. He noted, "The findings by the [FCE] examiner noted, '[Claimant] is able to work at the sedentary physical demand level for an 8 hour day with a power lift capability of 10.0 pounds.' Evaluation of potential work site locations should be done in view of [Claimant's] inability to sit or drive a vehicle for more than half an hour at a time." RX 29.

I find that the May 19, 2006 FCE and the opinions of Dr. Smith and Dr. Katz after that FCE represent the most accurate measure of Claimant's physical restrictions for purposes of evaluating suitability of the alternative employment proposed by Employer. I note that Claimant's physical restrictions were inconsistent over time but varied within a relatively narrow range (from sedentary to light work, from no lifting to a 25-pound lifting restriction, and from 10 to 30 minutes sitting/driving restriction), and they reflected an overall worsening trend due to his deconditioning. I find that the May 18, 1999 FCE is unreliable because it was conducted before Claimant reached maximum medical improvement and because he has become deconditioned since that time. Consequently, the subsequent restrictions given by Dr. Smith and Dr. Katz should also be rejected because they were relying solely or primarily on the results of the May 18, 1999 FCE as an objective measure of Claimant's condition. Tr at 257, 276; CX 33 at 20-21; CX 8 at 63; CX 17. Thus, although the May 19, 2006 FCE and the subsequent medical reports are not contemporaneous with the labor market surveys conducted by Employer's vocational expert on November 3, 2003; December 2, 2003; February 2, 2005; and February 8, 2006, I find that they nevertheless represent the most accurate measure of his capabilities and restrictions on those dates. I also find that because the May 19, 2006 FCE represents Claimant's current capabilities, it resolves the uncertainties and concerns raised by Dr. Katz and Dr. Smith at the time of the hearing about what would happen if Claimant were to actually try the proposed jobs

or perform them over time. To summarize, I find that Claimant's relevant physical restrictions are the following: sedentary work: lifting up to 10 pounds occasionally; no driving or riding in a car for more than 30 minutes without rest; frequent bending, occasional squatting, frequent kneeling, occasional stair climbing, and occasional crawling.

ANALYSIS

1. Extent of Disability

In cases involving disputes over an injured worker's extent of disability, the burden is initially on the claimant to show that he cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980).

If it is shown that the claimant cannot return to his past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer demonstrates the existence of suitable alternate employment in the geographical area where the claimant resides. See, e.g., *Bumble Bee*, 629 F.2d at 1327; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing suitable alternate employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, 629 F.2d at 1330. In addition, when considering whether a proposed job is suitable for a claimant, a factfinder must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and employment background would be hired if he diligently sought the proposed job. *Hairston,* 849 F.2d at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990).

If the employer makes the requisite showing of suitable alternate employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

a. Availability of Suitable Alternative Employment

The parties in this case do not dispute that Claimant is not capable of returning to his regular, pre-injury job as a tow truck driver. However, the parties do dispute the extent of Claimant's disability. Claimant contends he can do no work, while Employer contends he can do alternative work. Accordingly, the burden is on Employer to demonstrate the existence of suitable alternative employment.

Ms. Nedra Meyers, Employer's vocational expert, testified at the hearing as an expert in the field of vocational rehabilitation. Tr at 130-31; RX 20. Ms. Meyers is a vocational rehabilitation consultant with 25 years experience. Tr at 130. She has a Masters of Clinical Psychology degree that covers vocational guidance, and is a certified rehabilitation counselor, a certified vocational evaluator, and a fellow with Board of Disability Evaluators. Tr at 130-31.

Ms. Meyers testified generally that she believes Claimant can return to work. Tr at 134, 155. She stated, "I have put … one paraplegic to work. So, I don't believe [Claimant] is that disabled [to the point where he can't return to work.]" Tr at 155. She believes he can find work in Hawaii given his current medical conditions and work restrictions. Tr at 175.

Ms. Betty J. Sestak, Claimant's vocational expert, also testified as an expert at the hearing. Tr at 176; CX 32. Ms. Sestak has a Masters of Science degree in Rehabilitation Counseling and a Masters degree in Public Health. Tr at 177. She has been a rehabilitation counselor, mostly in worker's compensation and disability cases, in Hawaii since 1976, except for four years she spent in Ohio. Tr at 178. She opined generally that Claimant could find and perform a job within his physical restrictions "if he had the skills." Tr at 184, 193.

Ms. Meyers conducted labor market surveys on November 3, 2003; December 2, 2003; February 2, 2005; and February 8, 2006. RX 17; RX 24. Ms. Meyers testified that Claimant is able to perform the essential functions of the jobs in her labor market surveys, except for service writer, and that there are similar jobs currently available in the labor market. Tr at 145. I will analyze the suitability of the jobs from each labor market survey in turn.

i. November 3, 2003 Labor Market Survey

The November 3, 2003 labor market survey included the following 8 full-time positions: call center person at First Hawaiian Bank, customer service person at Money Mart, office person at The Storage Room, collections person at Ford Motor Credit, salesperson at Star Bulletin Midweek, customer service person at Geico Direct Insurance, reservationist at Dream Cruises, and salesperson at Pacific Ocean Producers. RX 17 at 380-85; CX 21 at 172-81.

All of the positions were classified as sedentary work, except the position at Money Mart, which was classified as sedentary to very light, and the position at Pacific Ocean Producers, which was classified as light work. RX 17 at 380-85. In addition, all of the position descriptions specified that the employee could sit or stand at will or for comfort, except the positions at Money Mart, The Storage Room, and Pacific Ocean Producers. RX 17 at 380-85.

On February 24, 2004, Dr. Katz approved all of these positions, except for the positions with Money Mart and Geico Direct Insurance, which he did not address at all. RX 3 at 21-26. On August 23, 2006, Dr. Katz again approved all of these positions without qualification, except for the positions at Money Mart and Ford Motor Credit, which he did not address, and the position at Pacific Ocean Producers, which he "approved if the high stool can be comfortably sat in without aggravating back." RX 29 at 2. Dr. Smith did not opine on any of these positions.

The position as a customer service person at Money Mart is not appropriate because it involves "sedentary to very light work" and was not approved by any of the physicians. The salesperson position at Pacific Ocean Producers is also inappropriate because it involves light work and was only approved with qualification by Dr. Katz. Although it falls within Claimant's basic restrictions, I find that the salesperson position at Star Bulletin Mid-Week is inappropriate because it is too stressful for Claimant's heart condition. Ms. Meyers also acknowledged that Claimant should avoid high stress jobs because of his heart condition. Tr at 136, 144. Ms.

Sestak asserted that the Star Bulletin position is a "very stressful" sales job, Tr at 186, and Employer did not rebut that testimony. I also note that Claimant expressed to Ms. Havre in November 2001 that he "is not interested in returning to sales which he feels is too stressful and demanding for him in his current condition." RX 9 at 202-03.

Therefore, after disqualifying the above positions, I find that the following positions fit Claimant's physical restrictions because they are described as sedentary work and specifically state that they allow the employee to sit and stand for comfort: call center person at First Hawaiian Bank starting at $8 per hour, collections person at Ford Motor Credit starting at $7 per hour, and reservationist for Dream Cruises starting at $7 per hour. *See* RX 3.

Moreover, I find that Claimant is capable of performing and obtaining each of these entry-level positions based on his educational background and skills. Both Ms. Meyers (RX 17 at 350, 378) and Ms. Sestak (Tr at 185, 194-95) noted that Claimant has good communication skills, which would be helpful in obtaining and performing each of these positions. Ms. Meyers and the vocational counselor Ms. Havre also noted that Claimant has customer service skills and public relations experience. Tr at 135; RX 9 at 137. I also note that, aside from his physical limitations, Claimant was successful in performing the "front-end" customer service position at Sam's Club in spring 2003 because he was a "people-type person." Tr at 47-48, 68-70. Ms. Sestak expressed concern that "if the customer service [work] has a lot of computer work or clerical work, [Claimant] would not have the skills to do it." Tr at 195. However, Ms. Sestak did concede that employers provide training on the specific computer programs required for each job. Tr at 194. I also note that Claimant seems reasonably confident in his computer skills, and testified that he would be willing to try a clerical job that required use of a computer, as long as it is within his physical restrictions. Tr at 121-22. I find that the computer skills Claimant acquired in 2001 would be adequate to obtain and perform these entry-level positions. I also find that Claimant's lack of clerical skills would not prevent him from obtaining these positions, given that they appear much more dependent on communication and customer service skills.

The average hourly wage for these three positions is $7.33, and the weekly earnings based on a 40-hour work week would be $293.20. After adjusting these earnings back to their value at the time of the injury, I find that Claimant's retained earning capacity as of November 3, 2003 was $237.72 per week.

ii. December 2, 2003 Labor Market Survey

The December 2, 2003 labor market survey included the following eight part-time positions: part-time operator at Physician's Exchange, operator at Doctors & Nurses Answering Service, cashier at Diamond Parking, clerical assistant at Doctor Luke's Family Chiropractic, teller at Hawaii National Bank, teller at City Bank, teller at First Hawaiian Bank, and teller at Bank of Hawaii. RX 17 at 368-75; CX 21 at 182-91.

Dr. Katz reported on February 24, 2004 that all of these jobs were "deemed acceptable." RX 3 at 19, 27; CX 13 at 106; Tr at 231. Dr. Katz approved six of the positions without qualification. RX 3 at 19, 27; CX 13 at 106; Tr at 231-34. He expressed concerns about the ability to stand, sit, and walk for comfort at the Diamond Parking position and about the

possibility of lifting beyond Claimant's restrictions at the Dr. Luke's Family Chiropractic position. RX 3 at 19, 27; CX 13 at 106; TR at 232-34. When asked at the hearing if he thought Claimant was physically capable of performing these eight jobs, Dr. Katz refused to state that Claimant was "capable of" doing the jobs and stated, "I want to be careful in how you word that, but he's physically capable of trying to do those jobs." Tr at 233-34. Dr. Katz noted on August 23, 2006 that the operator position at Doctors & Nurses Answering Service and the clerical assistant position at Doctor Luke's Family Chiropractic were "approved assuming the [light] filing is within limitations dictated by [the FCE]." RX 29 at 2.

I find that it is unnecessary to address the suitability of the part-time positions from this labor market survey given that I have already found that full-time suitable alternative employment was available to Claimant as of November 3, 2003.

iii. February 2, 2005 Labor Market Survey

The February 2, 2005 labor market survey included the following eight, full-time positions: customer assistance agent at City Bank, reservationist at United Airlines, reservationist at Dream Cruises, reservationist at Hawaiian Adventures, cashier/customer service person at Maxwell's Landing, cashier at Charley's Grilled Sub, customer service support person at Homeworld, and night auditor at Hawaii Polo Inn. RX 17 at 356-361; CX 21 at 192-201.

On June 5, 2005, Dr. Smith rejected all of these positions. CX 22 at 202-09; CX 33 at 59. Dr. Smith explained that he disapproved of the City Bank job from the February 2005 labor market survey because "primarily when I looked at the job description and consideration of his, you know, existing symptoms, I felt that the constant sitting, even though standing, walking for personal comfort were given as physical requirements, I just really felt from my experience [with] other patients, customer service rep in a bank, they're gonna do a lot of sitting and I really felt that he couldn't tolerate that." CX 33 at 34. In addition, the night auditor position at Hawaii Polo Inn was disapproved because it requires "occasional bending to get supplies." CX 33 at 35-36. He testified that he similarly disapproved of the other jobs from that labor market survey because he did not believe Claimant could tolerate the sitting and bending required by these positions. CX 33 at 33-35. Dr. Smith stated, "I believe, based on his capacity to sit and not aggravate the condition, that these jobs would be counter to that." CX 33 at 38. However, Dr. Smith did concede that positions allowing Claimant to sit and stand for a half-hour at a time would be technically within his restrictions. CX 33 at 61.

On November 15, 2005, Dr. Katz evaluated Claimant and reviewed the job descriptions with him. CX 13 at 114; CX 27 at 299; RX 4 at 34; Tr at 235. Dr. Katz approved four of these positions without qualification as positions that Claimant "could handle…or at least try." Tr at 236. However, for the other four positions at City Bank, Charley's Grilled Sub, Homeworld, and Hawaii Polo Inn, Dr. Katz stated that the bending requirements must be modified as Claimant's pain allows, the lifting requirements must be limited to 20 pounds, and Claimant must be able to get up and move around as needed. Tr at 236; RX 4 at 34-42. Dr. Katz approved all of these positions without qualification on August 23, 2006. RX 29 at 2-3.

I find that the customer service agent position at City Bank is inappropriate because the description does not specify that the employee would be able to sit or stand at will. RX 17. In addition, I find that the cashier position at Charley's Grilled Sub, the customer service position at HomeWorld, and the night auditor position at Hawaii Polo Inn are inappropriate because Dr. Katz noted on November 15, 2005 that "bending may need to be modified as pain allows, no picking up [more than] 20 [pounds]." RX 4 at 34-42. Although Dr. Katz approved these positions without qualification on August 23, 2006, I note that he did not discuss whether or why his earlier qualifications could be disregarded. I find that, according to the physical restrictions determined by the recent FCE, these positions remain unsuitable because Claimant still should not perform any lifting over 20 pounds. Therefore, after disqualifying the above positions, I find that the following positions are within Claimant's physical restrictions because they are sedentary work and allow the employee to sit or stand for comfort: reservationist at United Airlines, reservationist at Hawaiian Adventures, and reservationist at Dream Cruises.[6]

I find Claimant is capable of obtaining and performing these positions based on his educational background, work experience, and existing skills, for the same reasons as discussed above with regard to the November 3, 2003 labor market survey: Claimant has good communication skills, successful customer service experience, and adequate computer skills.

These three positions have starting wages of $7 per hour, such that the weekly earnings based on a 40-hour work week would be $280. After adjusting these earnings back to their value at the time of the injury, Claimant's retained earning capacity as of February 2, 2005 would be $223.47. However, I found above that Claimant's retained earning capacity was $237.72 per week as of November 3, 2003, and there is nothing in the record to suggest that he would not still be employed in one of those positions that I found suitable or that similar positions would not continue to be available. Moreover, this apparent decrease in Claimant's retained earning capacity between November 3, 2003 and February 2, 2005 cannot be supported by any significant change in Claimant's condition or his work restrictions that would make him unable to perform the positions from the earlier labor market survey. Therefore, I find that Claimant continued to be capable of earning $237.72 per week from November 3, 2003 onward.

iv. February 8, 2006 Labor Market Survey

The February 8, 2006 labor market survey included the following full-time positions: claims representative at AIG, claims representative at Allstate Insurance, claims representative at Geico, dispatcher at Aloha Kia/Hyundai, clerk at Servco Pacific Motor Imports, service representative at Geico, customer services coordinator at Servco Pacific, office clerk at HT&T Truck Center, service writer at Land Rover Honolulu, service advisor at Pflueger Auto Group, service writer at Jaguar of Honolulu, and service writer at New City Nissan. RX 24 at 434-441.

[6] Although the description for the Dream Cruises reservationist position on the February 2, 2005 labor market survey does not explicitly state that the employee may sit or stand at will, the description for the same position on the November 3, 2003 labor market survey does so state. Consequently, I approve this position as suitable alternative employment for both labor market surveys.

Ms. Meyers testified that for the February 2006 labor market survey she focused on the auto industry "because [Claimant is] very familiar with most of the areas of automobile work." Tr at 138. Ms. Meyers noted, "The Department of Labor approved the occupation of Service Writer for [Claimant]. In light of the restrictions presented by [Claimant's] physicians, the counselor finds such placement questionable in view of the physical demands of the job." RX 24 at 432. At the hearing, Ms. Meyers explained her reservations about the service writer positions, stating, "it's my opinion that that occupation is not good for him and he cannot perform it for several reasons. In the past, I have done job analyses of that job and it requires a lot of standing when they are busy. They cannot drop out and sit down…. When they're busy, they're very, very, busy and no time. He would have to be able to be on his feet for as much as three hours without stopping, and he could not do that at the tire store, and while there's no heavy lifting particularly, he would have to do a lot of bending. He would have to lift a hood of a car. While it is heavy, it does have some lifting help with the springs and what have you that would help him lift the hood, but he would be bending over the engine. He would be possibly getting on his knees looking under the car, depending on what the complaint was. So that is quite demanding physically." Tr at 143. Ms. Meyers explained that even though she did not feel the position of service writer would work for Claimant due to his restrictions, she identified service writer positions because he has desire to work in that job. Tr at 143.

On February 24, 2006, Dr. Katz approved five of the positions from the February 8, 2006 labor market survey. CX 32 at 308; Tr at 240-41, 247, 268. He did not approve of five positions because of the lifting requirements (claims representative for Allstate Insurance, customer services coordinator for Servco Pacific, service writer for Land Rover Honolulu, service writer for Jaguar of Honolulu, and service writer for New City Nissan). Tr at 240-41, 269; CX 32 at 308. Dr. Katz initially did not opine about two of the positions (claims representative for Geico; and service advisor for Pflueger Auto Group). CX 32 at 308. He later testified that he approved both Geico positions. Tr at 242, 269-70. He later testified that he would not approve the Pflueger position because it required lifting over 20 pounds. Tr at 270-71. Dr. Katz testified that he disapproved, or should have disapproved, any job requiring lifting over 20 pounds because of the original functional capacity evaluation. Tr at 243. Dr. Katz testified that the service writer positions were beyond Claimant's work restrictions. Tr at 244. When Dr. Katz showed the positions to Claimant and "asked him what he thought he could handle and what he couldn't and basically his opinion was the same as mine, which was the lifting ones were eliminated." Tr at 249. Dr. Katz confirmed that he thought Claimant could perform the jobs that he approved. Tr at 249. Thus, Dr. Katz approved a total of six jobs and disapproved six jobs. Tr at 271.

On August 23, 2006, Dr. Katz opined about these positions again, based on the May 19, 2006 FCE. RX 29 at 3. Dr. Katz approved four of the positions with qualification (claims representative at Geico, dispatcher at Aloha Kia/Hyundai, clerk at Servco Pacific Motor Imports, customer services coordinator at Servco Pacific). RX 29 at 3. Dr. Katz approved two positions with conditions (claims representative at AIG, and service advisor at Pflueger Auto Group), and the remaining positions (Allstate claims representative, Jaguar Service Writer, and New City Nissan Service Writer) were rejected. RX 29 at 3.

Most of the positions on this labor market survey, including the claims representative at AIG, the claims representative at Allstate, the dispatcher position at Aloha Kia-Hyundai, the

customer services coordinator position at Servco, the office clerk at HT&T Truck Center, the service advisor position at Pflueger Auto Group, the service writer position at Jaguar of Honolulu, and the service writer position at New City Nissan, are unsuitable because they are described as light or medium work, rather than sedentary work. RX 24 at 429-441. In addition, the clerk II position at Servco Pacific Motor Imports, although described as sedentary work, does not state whether the Claimant is able to sit and stand at will. RX 24 at 437. I also note that both physicians and both vocational experts agreed that the service writer positions are unsuitable. Tr at 142-43, 188-89, 244; CX 33 at 68-69.

Therefore, after disqualifying the above positions, I find that only two of these positions are within Claimant's physical limitations: the claims representative position at Geico and the service representative position at Geico. However, even though I find that Claimant would be physically capable of performing these positions, I find that he is not competitive due to his educational background and lack of clerical skills or office experience.

Ms. Meyers testified generally about the insurance claims positions that "[s]ome companies do demand a college degree and for some positions, a college degree is required, but for these positions, it is not." Tr at 141. On the other hand, Ms. Sestak testified that "realistically, most of the insurance companies here do want some college training…. Geico specifically, they've been hiring nurses lately for their claims adjusters, and most of the claims adjusters are fairly young here…. It's a very competitive area here." Tr at 183. Ms. Sestak opined generally that Claimant probably needs a two-year college degree to get any job doing sedentary office work within his restrictions. Tr at 184-85. Claimant testified that he was not competitive for the insurance positions for which he applied because a Bachelor's degree was required. Tr at 36, 79. I give little weight to the opinions of Ms. Meyers and Ms. Sestak on the issue of whether these positions require a college degree, because their opinions are based on general knowledge and perceptions of these types of positions and these employers, rather than direct questioning of the specific employers listed on the labor market survey. Similarly, I find Claimant's testimony too vague to support a finding that a Bachelor's degree is required for these positions. However, I do find that at least some college education is likely preferred for these positions and that Claimant would not be competitive with just a high school education.

In addition, Claimant has no experience working in an office setting and doing clerical work. Tr at 107, 194. Ms. Sestak opined, "I don't think he has the skills for any of the office positions, the adjusters, anything of this sort. He just does not have the skills and the background and the experience to do any of this." Tr at 185. I find that Claimant's lack of office experience or clerical skills would prevent him from being competitive for these positions. I also note that, at $16 per hour, these are relatively highly paid positions and are not entry level. Such positions likely require more advanced computer skills and experience than Claimant possesses.

Lastly, I note that Claimant's lack of college education, office experience, or clerical skills is compounded by the competitiveness in the Hawaiian labor market. Ms. Sestak testified that the Hawaiian labor market is "very competitive" and "the applicant pool is usually very high" because there are "a lot of young people who need jobs, middle-aged people who need jobs, and they have a lot of skills." Tr at 183, 198. Ms. Sestak also stated, "We have a lot of immigrants that come in from the Philippines who have been through college even. They come

with skills, office skills, and they're willing to work for probably whatever they can get." Tr at 186. Ms. Meyers agreed that the Hawaiian workforce includes many military dependents who are college graduates with office work experience and computer skills. Tr at 168-69. However, she testified that Claimant is not competing with these people for the jobs at Geico, AIG, and Servco because these employers want someone who will be there 10 years, rather than the 3 to 5 year duty station. Tr at 169-70. Although I find Ms. Meyers credible that some employers prefer to hire long-term residents of Hawaii rather than military dependents who are there for a limited time, her testimony does not refer to the specific jobs from the labor market surveys. I also find Ms. Sestak credible that the Hawaiian workforce includes large numbers of military dependents and immigrants who have college degrees and office/clerical skills. I find that these factors make Claimant even less competitive for positions requiring college education, office experience, or computer or clerical skills.

Thus, Employer did not meet its burden of establishing that the positions in the February 8, 2006 labor market survey constitute suitable alternative employment.

b. Competitiveness and Employability Considerations

I find that the following competitiveness and employability considerations confirm the conclusion that Employer has established suitable alternative employment for Claimant.

Claimant's Age

The vocational experts had slightly differing opinions on the impact that Claimant's age would have on his ability to obtain a job. Ms. Meyers stated, "He's young enough that many employers would be happy to have him" because he has "a job ethic. He's learned how to work." Tr at 135-36. When asked whether employers would be more likely to hire a younger candidate, Ms. Meyers stated that at AIG "[t]hey tend to hire older people and I specifically chose some of these [employers] because they do tend to hire older people because they appreciate the work ethic that they show." Tr at 166-7. She testified that AIG, Servco, and some divisions of Geico tend to hire older people in Hawaii, based on her general experience. Tr at 167. I find it credible that many employers would prefer to hire someone Claimant's age because of his work ethic and experience. However, I give little weight to Ms. Meyers' statements about specific employers because she based them on her general experience and not on employers' responses to questions about the positions listed on the labor market survey.

On the other hand, Ms. Sestak testified that Claimant was "probably considered middle age." Tr at 183. She added, "Realistically, as he is now, with the training and the skills he has now, I'd say it would be towards the twilight. I think he's still young enough that with some long-term training and acquiring the skills, then he would be able to find a job." Tr at 184. She conceded that it is possible to employ people Claimant's age, but that "50 is sort of the cutting edge." Tr at 193. I find Ms. Sestak's testimony somewhat exaggerated and not entirely credible. I find that Claimant's age makes him less competitive for positions that would require him to learn many new skills, but that it would not prevent him from obtaining a job.

Driving Distances /Commuting Times

The geographical location of the positions in Employer's labor market surveys is relevant in that Claimant is restricted in his ability to drive for more than a half hour at a time. Based on the results of the recent FCE, Dr. Katz noted in his August 23, 2006 report, "Evaluation of potential work site locations should be done in view of [Claimant's] inability to sit or drive a vehicle for more than half an hour at a time." RX 29. In conducting the labor market surveys, Ms. Meyers drew a geographical boundary 25 miles around Claimant's home. RX 17 at 379. However, there was testimony that it takes longer than a half hour to drive from Claimant's home to locations in the Honolulu area that are less than 25 miles away.

With regard to the commute, Ms. Sestak testified, "Many of the jobs were in town. Wahiawa is close to the North Shore. It's very difficult to get back and forth during rush hour, and rush hour runs from like 6 a.m. to 9. The people who try and avoid the rush hour are up at 4:30 and the rush hour traffic from Wahiawa would be at least an hour on a good day, probably closer to an hour and a half and that's one way, and this is constant." Tr at 180. In contrast, Ms. Meyers estimated that it would take "probably 30 minutes, 45 at the most" to drive from Claimant's home to a work location in Honolulu, but she stated that it would not surprise her if that drive took an hour and a half each way during heavy commute times. Tr at 169-70. However, she testified that Claimant's sitting/driving restriction would not prevent him from taking jobs with a long commute because there are ways to work around it. Tr at 171.

I note that Claimant has never expressed any reluctance to commute to the Honolulu area. On October 2, 2001, Ms. Havre noted, "[Claimant] did not have any significant concerns with regards to the geographical location of some of the employers, expressing willingness to commute to the Honolulu area where most of them are located." CX 21 at 148; RX 9 at 206.

I find Employer was reasonable in presenting suitable alternative employment located within 25 miles of Claimant's home, given that there are few, if any, appropriate positions available in the much smaller, more remote community where he lives. Even if Ms. Sestak is correct that it takes an hour and a half to drive from Claimant's home to Honolulu during rush hour, I find that such a commute would not violate Claimant's restrictions since he could adapt by working at off-peak times or stopping to take breaks during the commute.

Hawaiian Labor Market

The vocational experts dispute the effect that unique aspects of the Hawaiian labor market would have on Claimant's employability. Employer's expert conceded that she has less experience with the Hawaiian labor market but opined that, for purposes of conducting a labor market survey, "[t]he Hawaiian job market is a job market like most other job markets." Tr at 156. Ms. Sestak agreed that performing research for a labor market survey is generally the same from place to place but testified that the Hawaii job market is unique. Tr at 191, 196-97.

First, Ms. Sestak argued that the Hawaiian labor market is unique in its size. Tr at 191. She explained that "Oahu is very small. In California, you can go 30-50 miles to a different town and have a whole different job market, more opportunities. Here, once you have started

into the labor market, it's amazing how many employers know what's going on and they tend to talk to each other." Tr at 191. Similarly, Ms. Meyers expressed concern that the auto industry in Hawaii, in particular, is "a very small community, and my concern for [Claimant] would be that if he has really contacted a number of people and he's then well known within that community as having a bad back and people will shy away. It's going to be a harder sell." Tr at 174. Ms. Sestak also agreed that the auto industry specifically is small. Tr at 191-92. I find the vocational experts credible that the small, close nature of the auto industry in Hawaii could limit Claimant's ability to obtain a position in that industry, especially given that he contacted such a large number of employers in that industry during his OWCP vocational rehabilitation and had a few unsuccessful interviews. However, I decline to find that the labor market on Oahu generally is so small and close-knit that Claimant would be limited in obtaining a position in any industry.

Second, Ms. Sestak also explained that conducting labor market surveys in Hawaii is slightly different because employers are less upfront than employers on the mainland in that they will never admit that they would not hire or accommodate an injured worker. Tr at 197, 202-03. I decline to find that Hawaiian employers do not respond honestly to labor market surveys because such a finding would make it impossible to make a determination regarding suitable alternative employment for any claimant in Hawaii.

Third, there was testimony about the disproportionate impact that the September 11th tragedy had on Hawaii due to its dependence on the travel and hospitality industries. Ms. Meyers testified that the effect of the September 11th tragedy on the Hawaiian labor market continued "till probably about 2004 before it really picked up." Tr at 147-48. She testified that currently the labor market "seems to be almost what it was before." Tr at 148. Similarly, when asked if the Hawaiian labor market had rebounded since September 11th, Ms. Sestak stated, "It's certainly much better than it was." Tr at 189. *See also* 192. Given that Employer's first labor market survey was conducted on November 3, 2003, I find that the labor market had substantially recovered from the effects of the September 11th tragedy by that time and would not have prevented Claimant from returning to work.

Criminal Record

A pre-injury criminal record is relevant is determining if jobs are realistically available to a claimant. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), *rev'g* 19 BRBS 6 (1986).

Claimant has a criminal record of second-degree theft in 1998 for theft of equipment when he worked for Consumer Tire. Tr at 57. He was given a sentence of restitution and probation under a deferred acceptance program, and Claimant believes it has been stricken from his record. Tr at 57. He listed this record on his application for Employer and it did not prevent Employer from hiring him. Tr at 57-58; CX 2 at 14; RX 8 at 135. Claimant has had no further criminal problems. Tr at 58. Claimant testified that some applications that he has completed since his injury sought information about his criminal history, which he disclosed. Tr at 89.

Given all of these facts, I find that Claimant's criminal record would not present any substantial barriers to his obtaining alternative employment. *See Vecchiarello v. W.&J. Sloane, Inc.*, 5 BRBS 78 (1976)(finding claimant not totally disabled where his criminal record had not prevented him from obtaining employment in various fields in the past).

VA Benefits

Since 1980, Claimant has received service-connected disability benefits through the Veteran's Administration for his heart condition. Tr at 92-93, 106. At the time of his 1998 injury, he was receiving benefits based on a 10 percent disability rating. Tr at 92. After his heart attack in 2001, Claimant began receiving benefits based on a 30 percent disability rating. Tr at 92. At the time of the trial, these benefits amounted to $406 per month. Tr at 93.

Ms. Havre, Claimant's OWCP vocational rehabilitation counselor, noted on December 20, 2001 that "[Claimant's] current VA status as a disabled vet may not present very many incentives for him to actually secure employment, especially one that pays good/high wages." CX 21 at 155; RX 9 at 198a. Ms. Havre again noted in her March 21, 2002 concluding report, "[Claimant's] current VA disability status was also brought up as a barrier to the ultimate goal of vocational rehabilitation which is to return to work. … [Claimant] does have a significant disability percentage from the VA and has already been deemed by that agency to be totally disabled. A return to work will in essence have a significant and negative impact on benefits that [Claimant] is receiving from the VA." CX 21 at 161; RX 9 at 195.

Claimant testified that his VA benefits will not be reduced or lost if he takes a job. Tr at 98-99, 105-06. Claimant testified that has been receiving these benefits since 1980, and that he has reported his income as required and his benefits have not been reduced while he worked. Tr at 105-06. Claimant testified that he did not have any idea how Ms. Havre or anyone else could have come to the conclusion that his benefits would be reduced if he worked. Tr at 93-94, 105. Employer's vocational expert Ms. Meyers agreed that she did not believe Claimant's benefits would be reduced if he got work. Tr at 171.

The evidence demonstrates that Claimant's VA benefits would not be reduced based on his earnings from work. Although the fact that Claimant receives VA benefits may make him less motivated to find a job that a person with no income at all, I find that Claimant's VA benefits do not present a major disincentive to him seeking or taking alternative employment.

Employer-Provided Medical Insurance

Ms. Sestak testified about the requirement that employers in Hawaii provide health insurance for their full-time employees, and the effect that requirement has on employers' willingness to hire employees with health conditions. Tr at 199-201. Dr. Katz confirmed the existence of this requirement and testified that "the rates certainly go up" for employees with known risk factors. Tr at 274. However, Ms. Sestak denied that this requirement meant someone with a back injury would never be able to find a job. Tr at 203.

I decline to find that the requirement that Hawaiian employers provide medical insurance would prevent Claimant from obtaining a job because such a finding would make it nearly impossible for an employer to meet its burden of demonstrating the availability of suitable alternative employment for a claimant in Hawaii.

In conclusion, I find that the above employability considerations do not alter my findings that Employer met its burden of establishing suitable alternative employment for Claimant as of November 3, 2003 and as of February 2, 2005.

c. Claimant's Willingness to Work and Diligence in Seeking Employment

Once an employer meets its burden of demonstrating the availability of suitable alternative employment, the burden shifts to the claimant to establish total disability by showing that he has is willing to work and diligently sought appropriate employment but has been unable to secure it. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). The claimant need not seek jobs identical to those identified by the employer as suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employment need only be "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 202 (4th Cir. 1984). However, the jobs that a claimant seeks must be "appropriate" and consistent with the claimant's physical restrictions. *See Tann*, 841 F.2d at 543-44.

i. Willingness to Work

Claimant testified that he is currently looking for work and would like to return to work in a job that he is capable of performing with his restrictions. Tr at 79, 92. Claimant's willingness to work was confirmed by the vocational experts and Employer's medical expert. Ms. Sestak opined that "there's no doubt he would like to go back to work and he has the enthusiasm." Tr at 185. Ms. Meyers testified that Claimant's "desire [to return to work] is very high." Tr at 133. She stated that Claimant "has a very definite motivation to return. He has made some real efforts, even though they have fallen through, but there are occupations available to him out there within the restrictions that he has. He doesn't have such strong restrictions that he can't get out and do something." Tr at 134-35. Ms. Meyers also testified that Claimant is "the most honest person I know of." Tr at 162. She denied that Claimant was deceptive or a malingerer, stating "I believe this is a man who has made a real honest effort…" Tr at 163. Similarly, when asked if Claimant was enthusiastic about recovering and returning to work, Dr. Katz opined, "He's the kind of patient you want to have." Tr at 257-58. He also agreed that it appears that Claimant really wants to go back to work. Tr at 258.

Based on this testimony, I find that Claimant has met his burden of establishing his willingness to work.

ii. Diligence of Claimant's Search for Alternate Employment

OWCP Vocational Rehabilitation

During his OWCP vocational rehabilitation, Claimant went to job fairs and filled out general applications given to all employers present. Tr at 79, 114-15; RX 9 at 260. For reasons discussed below, I find that this evidence is largely irrelevant and fails to meet Claimant's burden of establishing that he made a diligent search for alternate employment.

Also during his OWCP vocational rehabilitation, Claimant applied for many service writer and collision estimator-type positions between September and December 2001. Tr at 79-80; CX 21 at 147-59 RX 9 at 198-211. Specifically, he testified that he applied to Jackson Auto Group, King Winward Nissan, and Firestone. Tr at 80; CX 21 at 147; RX 9 at 198-198a, 201-03. Claimant testified that he interviewed for a parts counter position and a service writer position at King Windward Nissan, and the interviewer indicated that Claimant did not have sufficient experience working with warranty guidelines and particular brands of cars for the service writer position and he was overqualified for the parts counter position. Tr at 51-52, 87. Claimant also applied for positions with the Cutter chain of car dealerships in or around December 2001. Tr at 109-10. Claimant testified that he was able to get an interview through a friend but was unsuccessful in getting an offer because he told the interviewer that the gap in his employment history was due to his back injury. Tr at 53, 57, 89-91. Ms. Havre also reported on December 13, 2001 that when Claimant followed up on a service writer vacancy at Cutter Ford for which he had applied, "The service manager apparently advised him that his computer skills may not be sufficiently proficient for him to utilize the company's estimating computer program, with this considered to be the primary deficit." CX 21 at 154; RX 9 at 198.

Claimant also applied for a few non-service writer positions as part of his OWCP vocational rehabilitation, including an auto parts counter position at the Pearl Harbor Navy Exchange and a recreation assistant position at Kaneohe Marines. Tr at 111-14; RX 9 at 202-03.

There was considerable testimony regarding why Claimant's OWCP vocational rehabilitation was unsuccessful. Claimant testified that he gave the OWCP vocational rehabilitation program his "best effort" and he "wanted to go to work." Tr at 112-13. However, he believes the gap in his employment history "complicated" his ability to get a job, despite the fact that, other than Cutter, no other employers have asked him to explain the lapse in his work history or have requested information about worker's compensation claims. Tr at 88-89, 91. Claimant also testified that Ms. Havre coached him on how to respond effectively to employers' concerns about the gap in his employment and his injuries. Tr at 43-44, 91, 112; CX 21 at 150. In addition, Claimant testified that he was unsuccessful because of the effects of the September 11th tragedy, but that he continued to look for work. Tr at 53, 122-23.

Employer's expert Ms. Meyers and Claimant's expert Ms. Sestak agreed that the September 11th tragedy had a significant impact on the labor market in Hawaii, and was at least part of why Claimant was unsuccessful in getting a job in 2001. Tr at 147-48; Tr at 182, 189, 192. However, Ms. Meyers opined that Claimant's vocational rehabilitation was unsuccessful because he was not given sufficient instruction and training, and she testified extensively about

what she would have done differently. Tr at 145-147, 152, 154, 160-66, 175. In contrast, Ms. Sestak testified, based on her strong familiarity the OWCP vocational rehabilitation program and Ms. Havre, that it "certainly looked like she was working hard" and that she could not think of anything else Ms. Havre should have done and that it "looked like she had covered all her bases." Tr at 182. However, when asked about why Ms. Havre attempted to locate work for Claimant as a service writer when he cannot physically perform such work, Ms. Sestak stated, "I think it may have been partly wishful thinking." Tr at 192.

I find that it is irrelevant why Claimant's job search as part of his OWCP vocational rehabilitation program was unsuccessful. Rather, the relevant inquiry is whether Claimant's OWCP job search from September 2001 through January 2002 constituted a diligent search for alternate employment. Again, to meet his burden of demonstrating a diligent search, Claimant must show that he sought jobs "within the compass of employment opportunities shown by the employer to be reasonably attainable and available" and that are appropriate for his physical restrictions. *Trans-State Dredging*, 731 F.2d at 202; *Tann*, 841 F.2d at 543-44. The vast majority of positions for which Claimant applied during his OWCP job search were service writer and collision estimator-type positions, which are not "appropriate" for his physical restrictions. Although Claimant also went to job fairs and applied for a few non-service writer positions during his OWCP job search, I find that these attempts are insufficient to meet Complainant's burden because they are inadequate in number, too remote in time from Employer's labor market surveys, and are not clearly "within the compass of employment opportunities shown by the employer to be reasonably attainable and available."

Post-2002 job searches

Again, I note that Claimant is not required to apply for jobs identical to those identified by Employer as suitable alternate employment. *Palombo*, 937 F.2d at 74. However, the fact that Claimant did not apply for any of the positions listed on Employer's labor market surveys is relevant to whether he conducted a diligent search for employment. Claimant confirmed that he had reviewed the labor market surveys and thought he was physically capable of doing the jobs within his limitations. Tr at 121. Despite this, Claimant conceded that he never applied for any of the jobs listed on the November 3, 2003 labor market survey or the February 2, 2005 labor market survey. Tr at 81-83, 85-86. Claimant testified that he did not recall ever seeing the December 2, 2003 labor market survey. Tr at 83-84. Claimant testified that he first saw the February 8, 2006 labor market survey a few days before the hearing but that he would apply for the jobs "if I find out where the leads are" and "would be willing to try to do the jobs with adjustments." Tr at 86. I find that Claimant's vague statement of intent to apply for jobs listed on the February 8, 2006 labor market survey is insufficient to meet his burden of demonstrating a diligent search.

Despite not applying for any jobs listed on the labor market surveys, Claimant may meet his burden by showing that he applied for positions that are "within the compass of employment opportunities shown by the employer to be reasonably attainable and available" and consistent with his physical restrictions. *Trans-State Dredging*, 731 F.2d at 202; *Tann*, 841 F.2d at 543-44.

Claimant's testimony about his job searches since he completed his OWCP vocational rehabilitation in 2002 was vague, confusing, and contradictory. First, he could not recall the dates of any applications, and testified generally that he conducted job searches between 2002 and 2005. Tr at 56. Claimant also testified generally that he participated in job fairs between 2003 and 2005, but did not name any fairs or dates. Tr at 126.

Second, Claimant testified that he had applied for a position at Winward Dodge in 2004. Tr at 87. However, I do not find this testimony credible because it appears remarkably similar to the Windward Nissan positions that he interviewed for in 2001. *Compare* Tr at 87 with Tr at 51-52; CX 21 at 147; RX 9 at 201-03. Claimant also testified that in or around 2004 he applied for service writer jobs at Service Motors and at Jackson Auto Group. Tr at 87-88. Again, this testimony is not completely convincing because Jackson Auto Group was one of the employers to which Claimant applied in the fall of 2001. *See* Tr at 80; CX 21 at 147; RX 9 at 201-03. In addition, I do not find it very credible that Claimant would continue to apply for service writer positions after he learned through applying for such positions during his OWCP vocational rehabilitation that he was not competitive. Tr at 36, 79, 51-52, 87; CX 21 at 154; RX 9 at 198.

Lastly, Claimant first testified that since 2001, he has only applied for service writer jobs. Tr at 124. On redirect, Claimant agreed that he had applied for jobs at Homeworld and Enos Tours. Tr at 126. Then, when asked again if he has pursued jobs outside the auto industry since 2003, Claimant testified Home Depot was the one non-auto job he applied for since 2003, and he was not given an interview. Tr at 126-28.

I find that Claimant's testimony regarding the positions to which he has applied since 2002 is too vague, indefinite as to time, and unsupported by corroborating evidence to establish a diligent search for employment. Moreover, even if I credited all of Claimant's testimony and found that he had applied to Windward Dodge, Jackson Auto Group, and Service Motors in 2004, those applications would not meet Claimant's burden because service writer-type positions are not appropriate given his physical restrictions. Similarly, even if I credited Claimant's testimony and found that he had applied to HomeWorld, Enos Tours, and Home Depot, those three applications are too few in number to establish a diligent search for employment.

Finally, I note generally that Claimant has expressed a strong interest in remaining within the automobile industry because most of his experience is in that industry and he enjoys working in that industry. Tr at 35, 123-24. Claimant's single-minded interest in remaining in the auto industry led Ms. Havre to pursue a vocational plan for the occupation of service writer. Tr at 35; RX 9 at 137, 261. This interest also led Ms. Meyers to include service writer positions in her February 8, 2006 labor market survey, even though they were not physically appropriate for him. Tr at 138, 143. Ms. Sestak agreed that Claimant enjoys the auto industry and gravitates toward those jobs, but that he cannot physically perform the auto industry jobs, especially the service writer positions. Tr at 180, 188-89. In addition, Claimant's interest in working only in the auto industry led Dr. Smith to state that he "would discourage pursuit of bank/financial related jobs due to lack of vocational interest and skill level. [Claimant's] aptitude, skills and enthusiasm involved the automotive area and remains his vocational area of choice." RX 28. Claimant was so intent on working in the automotive industry that he continued to express interest in service writer positions even after it should have been clear that he was not capable of performing them

nor was he competitive for them. Tr at 79, 114. While I understand Claimant's preference to work in the field in which he has experience and his belief that he will be a better employee if he enjoys his work, Tr at 124, I note that "this desire to remain in his lifetime occupation should not be used to Employer's detriment." *Blanks v. Ingalls Shipbuilding, Inc.*, 34 BRBS 84 (ALJ)(Feb. 14, 2000). Thus, while Claimant cannot be forced to work outside the automobile industry, Employer is entitled to have Claimant's compensation rate reduced according to his wage earning capacity in jobs he is capable of obtaining and performing, regardless of the industry.

Thus, for all of the reasons discussed above, I find that Claimant failed to meet his burden of demonstrating the he conducted a diligent search for employment, and consequently, Claimant cannot be considered totally disabled.

3. Calculation of Permanent Partial Disability Benefits and Employer's Entitlement to Credits for Overpayment of Compensation.

Claimant's retained earning capacity as of November 3, 2003 was $237.72 per week. According to subsection 8(c)(21) of the Act, a claimant is entitled to sixty-six and two-thirds percent of the difference between his average weekly wage and the amount of his weekly wage earning capacity, payable during the continuance of the partial disability. Making this calculation based on Claimant's average weekly wage of $459.08 and a weekly wage earning capacity of $237.72 yields a compensation rate of $147.57. Thus, Claimant should have been compensated at the rate of $147.57 from November 3, 2003 through the present and continuing.

According to the parties' stipulations, Employer paid Claimant compensation at the rate of $306.07 per week for the following periods: temporary total disability from July 6, 1998 through July 7, 1998; one day on July 16, 1998; from July 27, 1998 through July 29, 1998; from July 31 1998 through August 4, 1998; and from September 30, 1998 through October 30, 2000; and permanent total disability from October 31, 2000 through March 21, 2004. Employer has also paid Claimant permanent partial disability from March 22, 2004 through the present and continuing at the rate of $92.72 per week.

Claimant was entitled to, and correctly paid by Employer, total disability compensation at the rate of $306.07 per week through November 2, 2003. From November 3, 2003 through the present and continuing, Claimant was entitled to permanent partial disability compensation at the rate of $147.57. Thus, Employer overpaid Claimant by $158.50 between November 3, 2003 and March 21, 2004, but has underpaid Claimant by $54.85 since March 22, 2004.

Based on the above calculations, I find that, on balance, Employer has underpaid Claimant and therefore, is not entitled to a credit for overpayment of compensation. The District Director shall give Employer a credit for the compensation already paid and compute the total amount owed to Claimant for underpayment of compensation.

CONCLUSION

I find that Claimant is unable to return to his usual employment. I find that Employer has demonstrated the availability of suitable alternative employment, such that Claimant's retained earning capacity was $237.72 as of November 3, 2003. Claimant has failed to demonstrate that he conducted a diligent search for employment. Consequently, Employer is liable for permanent partial disability compensation at the rate of $147.57 from November 3, 2003 through the present and continuing. Employer continues to be liable for Claimant's medical care for his work-related back condition.

ORDER

1. Employer shall pay Claimant permanent partial disability compensation at the rate of $147.57 per week from November 3, 2003 through the present and continuing.

2. Employer is entitled to a credit for compensation already paid.

3. Employer shall pay Claimant interest on any unpaid compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

4. Employer is liable for medical care related to Claimant's back condition.

5. All computations are subject to verification by the District Director, who in addition shall make all calculations necessary to carry out this order.

6. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of Employer's Statement of Objections, Claimant's counsel shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be

considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

7. The parties will immediately notify this office upon filing an appeal, if any.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh